Bureau of Competition Policy

Speech

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NATIONAL COMPETITION LAW SECTION

LUNCHEON ADDRESS

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INTRODUCTION

Good afternoon, I'm very pleased to be here today. As the theme of today's program is "Living with the *Competition Act* in the 1990s -- Dos and Don'ts for Business," I thought it would be also be useful to discuss "Living with the *Competition Act*" from the perspective of the Bureau of Competition Policy.

GOVERNMENT REORGANIZATION

As you are aware, on June 25 the Prime Minister announced the creation of new ministries. Most of Consumer and Corporate Affairs has joined Industry, Science and Technology, and part of the Department of Communications. As a result, the Bureau of Competition Policy is now part of this new entity called Industry and Science Canada*.

I want to stress that the Bureau of Competition Policy's integration into the new Industry and Science Canada has had no effect on the enforcement priorities of the Bureau: the independence of the Bureau is intact. The Director of Investigation and Research (DIR) continues to have sole authority for the enforcement of the *Competition Act*.

One change I am facing is that a larger portion of the DIR's time is spent on management issues; in particular, the reorganization of the Department and the continuing budgetary cuts. This is a growing preoccupation, not only for myself

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*On November 4, 1993, the department became known as Industry Canada.

but for all my management team. It may take us longer than it used to to return your phone calls.

Priorities reflect continued budgetary constraints and to the extent that choices need to be made, they will be made on discretionary activities.

BUREAU PRIORITIES

The Bureau's top priorities remain the same. We will continue to concentrate on merger examinations and on key offences such as conspiracy, bid-rigging and abuse of dominant position. The enforcement of the law in relation to these types of offences emphasizes one of the primary points of our purpose -- to promote the efficiency and adaptability of the Canadian economy. Regarding misleading advertising and deceptive marketing practices offences, the Bureau will continue to shift its focus towards practices which have had a high impact, or a national impact.

Our approach to enforcement remains guided by the belief that we need a range of enforcement instruments to ensure compliance with the Act. Such a strategic approach allows for the attainment of the objectives of the Act without resorting to formal proceedings in each and every case. But even where formal proceedings are undertaken, we are seeing novel resolutions. For example, in a prosecution for misleading advertising against Goodman's China and Gift Store Ltd. and Samuel Goodman, Mr. Goodman was placed on six months' probation during which he must perform 60 hours of community service.

The investigation of violations of the Act with a view to prosecution and the imposition of criminal penalties is the approach that will be continued as the primary method of enforcement in cases where the economic harm is unambiguous. In the area of criminal matters, we are talking about cases involving conspiracy to fix prices, and bid-rigging.

Work within the Bureau is proceeding on the development of internal principles or guidelines for the purpose of making recommendations on sentencing to the Attorney General. Our objective is to ensure that our recommendations on penalties to the Attorney General are based on a consistent and meaningful set of principles which can be applied to cases that differ markedly in substance and impact. The guidelines are just that: guidance for officers who are advising on an appropriate penalty in a particular case, and canvassing the factors that form the basis for that recommendation.

These sentencing considerations are being developed for internal use to help us make recommendations to the Attorney General with respect to sentencing. They should not be confused with the Enforcement Guidelines released publicly by the Director concerning certain provisions of the Act. Certainly, these internal guidelines in no way approach the legislative status of the U.S. Guidelines and, as such, are not intended to fetter the discretion of either the Attorney General or the courts.

One area where we have been focusing recently is communications between competitors that may cross the line into challengeable conduct. In particular we are examining the practice of signalling intended action as a means to ensure concerted

behaviour. This can include the use of the media to announce future price increases or planned changes in output; the communication of information on business intentions by parties to a proposed merger which doesn't come to pass; and the practice of privately communicating the fact of a price increase to one's competitors with the hope that it will be matched.

Another of the Bureau's priorities is compliance. Voluntary compliance with the *Competition Act* remains paramount for us. We realize that compliance with the Act can best be achieved when the business community has a sound understanding of the Act.

Accordingly, I will continue to place a strong emphasis on communication and education. Publishing information pamphlets and guidelines, providing advisory opinions, and ensuring that cases undertaken and resolutions reached are communicated to the public are important ways for the Bureau to get its message across. We have just recently adopted a new, more strategic approach to our public education initiatives.

The Bureau continues to be involved in informational seminars and meetings with industry groups like AFCC (AgriFood Competitiveness Council) and GPMC (Grocery Products Manufacturers of Canada).

We intend to continue our dialogue with the legal community, and in particular with the competition bar, mainly through this CBA section. We will not be using private sector legal conferences as a means of communicating with the business community as much as we have in the past. We are going to be much more proactive

in talking directly to the small and medium business sector. We are launching a new initiative to bring our message to places like chambers of commerce, boards of trade, and so on.

And we'll be issuing pamphlets to a wider audience, using plain language, on topics such as misleading advertising, price-fixing, compliance, refusal to deal, and others.

NEW ISSUES

While our top priorities have remained the same, we are, at the same time, facing new issues in the way we operate. As part of the government reorganization process, the Bureau is involved in a business planning exercise. This involves a fundamental examination of the services that clients need, the efficiency and effectiveness of current approaches to meet those needs, and an exploration of alternate methods of service delivery. Performance standards will then have to be developed. This follows a successful pilot project to develop a business plan for our Marketing Practices Branch, which came into effect on April 1, 1993.

For us, the business plan is a forward-thinking exercise in how to fulfill our mandate in an environment where our resource base is shrinking.

The Bureau is in the middle of consultations on our cost recovery proposal. We have received many thorough and well-considered submissions, which we are in the process of reviewing. While the proposal, or parts of it, is viewed as problematic to

some, these concerns must be weighed against the current impetus for cost recovery within the federal government. This balancing act is especially challenging for law enforcement agencies such as the Bureau. We are giving our proposal a solid second look in light of the submissions, and we will initiate a second round of consultations in due course. I await the CBA submission on this proposal.

Another increasingly important issue is electronic searches. Virtually all of the companies that have been subject to search and seizure by the Bureau in recent years maintain a significant number of their records in electronic form. To meet this challenge the Bureau has begun to obtain the knowledge, skills and expertise required -- both through training our own staff and through co-operation with other law enforcement agencies in Canada. We are dedicating a significant amount of effort to this priority.

The Bureau is pursuing several initiatives to ensure that the *Competition Act* and our enforcement policies remain up-to-date and consistent with "best practices" in other industrialized countries. A particular focus is on the treatment of joint ventures and strategic alliances. In addition to in-house analysis and research, the work involves consultations with interested groups such as the GPMC. I hope to release a policy statement describing our analytical approach to such arrangements early in 1994.

As well, as I mentioned earlier, we are working closely with our new colleagues at Industry and Science Canada on issues relating to marketplace framework rules and their role in promoting the efficiency and competitiveness of Canadian industries.

Resources are also being used is in examining the tools we have available, in particular, to deal with cross-border issues (e.g. MOUs, MLAT, bilateral meetings, informal co-operation, etc.) Discussions are underway with the Federal Trade Commission and the Department of Justice exploring the need for possible revisions to existing bilateral arrangements.

The Bureau is also the Canadian representative on the International Marketing Supervision Network, established in 1992 and comprising approximately 20 member countries. As markets become increasingly globalized it is imperative that the tools available to the DIR to deal with competition issues in these markets be as effective as possible.

On a related issue on the international front -- I know that some of you are interested in the Bureau's practices vis-à-vis confidentiality and, in particular, our interpretation of section 29 of the *Competition Act*. Important issues have arisen recently on the interface between section 29 confidentiality rules and the use of MLAT mechanisms in Canadian and U.S. competition cases. We are currently studying these issues in order to develop a sound and consistent policy. I expect to convene a consultative forum in the near future to discuss these matters.

As you may be aware, Mexico now has a competition law. The legislation is very new: it came into effect on June 23 of this year. Two Mexican officials studied at the Bureau for seven weeks in May and June. During this time they participated in a very intensive training program on how the Bureau does business.

Contact between the Bureau and members of the Mexican Federal Competition Commission is continuing. In fact, on Tuesday I will be addressing a conference attended by Mexican government officials responsible for administration of the new Act and senior representatives from the business sector in Mexico.

Other international activity includes our work on the OECD Committee on Competition Law and Policy. This committee provides a forum for the exchange of information on topics of mutual concern and, where appropriate, helps to ensure greater uniformity of international antitrust policy among participant countries. The Bureau is chairing a special working group on competition law convergence.

CONCLUSION

I hope my discussion here today has helped to provide you with the Bureau's perspective on many of the challenges we face as we go about "doing business in the 90s." The messages I hope I have conveyed to you are:

1. The enforcement priorities of the Bureau have not changed.
2. The re-organization of government departments has not fettered the independence of the DIR. We do not share confidential information with other sectors of the department.
3. Our compliance/education program will be more strategic, and we will be talking more directly to the business community and more frequently than in the past to the small- and medium-sized business sector.

4. We are putting significant efforts into our enforcement policy regarding confidentiality/S. 29; strategic alliances; tools available for international co-operation; and cost recovery.

Thank you very much.